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The Equitable Distribution of Marine Resources by Agreement of States—The Case of the South China Sea

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Abstract

The socially just distribution of maritime spaces and their resources among States is a key concern of the 1982 UN Convention on the Law of the Sea. This concern underlies the general apportionment of those spaces to coastal States as well as the concrete delimitation of any overlapping claims. The Convention prescribes that such delimitation be equitable. Much attention so far has been given to the judicial performance of such maritime boundary delimitation. This paper focuses on the alternative of delimitation by negotiated agreement of States. It conceives of delimitation as institutionalized oceans governance. This governance seeks to achieve the indeterminate objective of equitable delimitation by combining two broad approaches with machinery for their concretization. For one, the Convention adopts a geographical approach, implemented through the concept of maritime zones extending seawards of the land. Yet the Convention also countenances a non-geographical approach based on historic titles grounded in customary law. For concretising these broad approaches into principles, rules, and decisions, the Convention institutionalizes comprehensive judicial decision-making. Courts and tribunals have indeed developed an *acquis judiciaire* favouring delimitation by means of the equidistance/relevant circumstances method that is binding on States. However, the Convention gives preference to the equally institutionalized negotiated delimitation of marine entitlements, by means of the agreement of the coastal States concerned. These States therefore retain a considerable margin of appreciation for negotiated delimitation, drawing on state practice to identify the principles appropriate for the individual instance. The paper first develops this governance framework and then exemplifies its workings in the case of the South China Sea, marked by several, ongoing maritime delimitation disputes to be resolved by negotiated settlement.

Keywords

Law of the sea – Public International Law – Global Social Justice – Global Governance through Judicial and Political Machinery – the South China Sea

1 Introduction

The United Nations Convention on the Law of the Sea aims to settle “all issues relating to the law of the sea”.¹ The globally socially just distribution of the vast resources of the sea, living, and non-living, is one such issue. The Convention translates this issue into two governance tasks, i.e. the general apportionment of such resources among States and the delimitation of overlapping claims by several States to the same maritime spaces and their resources. On its face, the Convention merely prescribes that the delimitation achieves an equitable outcome.² Since the drafting of the Convention, the search for equitable principles *infra legem* that might assist in this task has been ongoing. The has mostly focused on the judicial development of such principles.³

Yet, on their face, the relevant Convention provisions primarily mention delimitation by agreement of States.⁴ The first purpose of this paper is to develop a framework for delimitation that takes account of this value judgment of the Convention. To do so, the delimitation of maritime spaces is seen as a task for institutionalized oceans governance. The overall objective of an equitable delimitation result is to be achieved on the basis of two broad normative approaches underpinned with political and judicial machinery for their legally binding concretization in contested instances. Pursuant to the rationale that the land dominates the sea, the Convention for one offers a geographical approach, through the concept of maritime zones seawards of the land, comprising the territorial sea, the exclusive economic zone, and the continental shelf. The Convention also countenances an alternative,

1 United Nations Convention on the Law of the Sea (done 10 December 1982, entry into force 16 November 1994), 1833 UNTS 3, first preambular paragraph [hereinafter referred to as UNCLOS or the Convention]. Articles cited without particular references are those of the Convention.

2 Arts. 74 and 83. Only Art. 15 also offers a means to this effect.

3 For comprehensive literature references see Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (Cambridge University Press 2015), in particular pp. 271–352.

4 See the wording of Arts. 15, 74 and 83 (“failing agreement”; “shall be affected by agreement”).

non-geographical approach based on historic titles in customary law. These approaches then need to be concretized into operational principles, as well as rules and decisions. Courts and tribunals have been making considerable progress over time in developing such principles, culminating in the Arbitral Tribunal in the recent *Bay of Bengal* case declaring delimitation of overlapping claims of coastal States on the basis of the median line modified by relevant circumstances to constitute *acquis judiciaire*, which is said to form a source of law within the meaning of Art. 38(1)(d) of the Statute of the International Court of Justice.⁵ These judicially developed principles leave a considerable margin of appreciation to States, and it thus falls on the political mechanism of the agreement of the coastal States concerned to achieve an overall equitable delimitation on the basis of the most suitable equitable principles.

The second purpose of the paper then is to exemplify the workings of delimitation by agreement of States. It uses the case of the South China Sea (SCS), for the twin reasons of that sea's significance and of its capacity to test the paper's model rigorously. First, the several, and acute delimitation disputes of the riparian States of that sea will have to be resolved by agreement, since a judicial decision is not to be available at least as far as China is concerned. Second, the claims by its riparian States of entitlement to its resources are based on both zonal and non-zonal grounds, throwing into relief that any delimitation governance must accommodate both.

The article is structured as follows: Section 2 develops the Convention's general approach to the socially just distribution of marine resources seawards of the land, discussing the judicial shaping of equitable principles and their implications for settlement of delimitation disputes by agreement of States. Section 3 moves to exemplifying the insights gained, providing background on the SCS scenario. Section 4 establishes that the disputes of the SCS cannot be judicially decided as no court or tribunal has jurisdiction in regard to China. Section 5 examines what the applicable equitable principles are on which the riparian States could base a negotiated agreement for that sea. The Conclusions point out the implications of the article's findings for analysts and for actors.

5 In the *Matter of the Bay of Bengal Maritime Boundary Arbitration (The People's Republic of Bangladesh v The Republic of India)*, Award of 7 July 2014 [hereinafter referred to as *Bay of Bengal Award*], available at http://www.pca-cpa.org/showpage.asp?pag_id=1376 (last visited on 29 April 2015).

2 **The Equitable Delimitation of Contested Maritime Entitlements under the Law of the Sea Convention: Norms, Machinery and Principles**

The distribution of marine resources raises the question of global social justice. The Convention embodies a universal, rules-based approach to this distributive task. The overall objective of the Convention is to secure the just and equitable distribution of marine resources within the legal order of the oceans that the Convention establishes. It spells out this overall objective of its approach in its preamble. The Convention intends to establish an objective legal order for the oceans to promote the equitable utilization of marine resources, according to the third preambular paragraph of the Convention.⁶ The achievement of that goal will then contribute to a just and equitable international economic order, as the next preambular paragraph indicates. The Convention distinguishes three categories of marine resources that end. First, it subjects the resources of the deep seabed, certainly the mineral resources thereof, to the principle of common heritage of mankind, involving a strong re-distributional element among all States. Secondly, the resources of the high seas are subject to the jurisdiction of each State, reverting to its capacity and will to exploit those. Thirdly, the resources landwards of the deep seabed and the high seas are subject to the jurisdiction of a specific State. In order to identify that State, the Convention employs two normative, equitable principles. The Convention bases itself, first, on the approach that the land dominates the sea (2.1). But it also countenances a role for the principle that historic uses of the sea ought to translate into present resource allocation (2.2). But the Convention also establishes bifurcated machinery for their application, in the shape of judicial and political decision-making in delimitation disputes (2.3). While it is true that the judicially developed equitable principles then become binding for States (2.4), States retain a considerable margin for delimiting their maritime boundaries (2.5).

2.1 ***The Land Dominates the Sea: Zonal Apportionment and Delimitation***

The approach that the land dominates the sea, originally formed in customary law and incorporated into the Convention, captures the equitable norm

6 The International Court of Justice has recently confirmed the central, and operational significance of this preambular paragraph in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, [2012] ICJ Rep 624, paras. 113–31 [hereinafter *Territorial and Maritime Dispute*].

that input ought to determine the share in the output.⁷ The input here is the presumed or generalized effort of the coastal state to husband the resources in the waters and seabed seawards of its coast. This geographical approach underlies the legal concept of maritime zones. The Convention designs three such maritime zones: the territorial sea, the exclusive economic zone, and the continental shelf, in which the coastal State is to enjoy sovereignty or sovereign rights over the resources found there. This approach then applies to the two distinct functions of apportionment of zones to individual coastal States vis-à-vis the international community and of delimitation of zones between two or more coastal States.⁸ In fact, the Convention law makes explicit that the delimitation of the maritime zones between States with adjacent or opposite coasts must achieve an equitable outcome.⁹ Equity here becomes equity *infra legem*.

2.2 *Non-Zonal Apportionment and Delimitation*

The role that geography plays in the apportionment and delimitation of marine resources under the Convention is, however, complemented by a non-geographical approach, in the shape of the role that historic title and historic use play. This also is an equitable norm, not just one of legal certainty. Historic title and uses store concrete collective efforts, the sustained input into governing and using oceans spaces by a State and its citizens that ought to be considered with regard to the current distribution. However, historic title remains one of the least well-settled legal concepts of the Convention. No definition or test has been provided by a court or tribunal under the Convention since its entry into force, although the historic title would refer to legal concepts and facts predating the Convention. Both ITLOS and the Arbitral Tribunal in the two *Bay of Bengal* cases have avoided doing so in regard to the term “historic title” featuring in Article 15, other than indicating that such title would have to be argued. To induce some doctrinal rigour, two questions then need to be distinguished.

The first question is the legal status of historic title. This is indeed a concept of the customary international law of the sea, rather than the Convention. Historic title was first recognized in regard to maritime boundaries prior to the conclusion of the 1982 Law of the Sea Convention in *Anglo-Norwegian*

7 In the classic sense of proportionality, see Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge University Press 2001), at 10.

8 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] 1CJ Rep 3, 22, para. 18 [hereinafter *North Sea Continental Shelf*].

9 Arts. 74(1), 83(1) UNCLOS.

Fisheries. There, the ICJ defined historic waters as waters which are treated as internal or territorial waters but which would not have that character but for the existence of a historic title. The Court recognized the historic use of waters as a non-geographical factor capable of justifying the apportionment of waters to a State.¹⁰ In the case, the Court required the consistent practice of the coastal state claiming those waters—there through a system of straight baselines—and the toleration of that practice by the international community and any specially interested other State.¹¹ The issue of historic title arose again at the Law of the Sea Conferences. A study by the UN Secretariat had defined historic waters as waters over which coastal states, contrary to generally applicable rules of international law, clearly, effectively, and continuously, exercise sovereign rights with the acquiescence of the interested States. It appears that everyone was content with this at the First Conference.¹² At the Third UN Conference on the Law of the Sea, States could not establish general agreement on the role of historic titles for the allocation of maritime spaces.¹³ The Convention therefore recognizes the category of historic title as customary law. This was succinctly stated by the ICJ in *Continental Shelf*, for a Convention then still in draft:

[T]here are, however, references to “historic bays”, or “*historic title*” or historic reasons in a way amounting to a clear *reservation* to the rules set forth therein [in the Convention]. It seems clear that the matter continues to be governed by general international law which does not provide for a single “regime” for “historic waters” or “historic bays”, but only for a particular regime for each of the concrete cases of “historic waters” or “historic bays”. It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law. The first régime is based on

10 *Anglo Norwegian Fisheries (UK v Norway)*, [1951] ICJ Rep 116, 133.

11 *Ibid.*, pp. 116, 130, and 138–39. The UK in that case argued that historic title had two conditions: (i) actual exercise of authority by the claimant State; and (ii) acquiescence by other States. By contrast, Norway had not required the latter.

12 UN Doc A/CN.4/143. The ILC had requested the study, but concluded that the topic did not require active consideration by the Commission in the near future at its twenty-ninth session, 3 May to 29 July 1977, ILC Report, A/32/10 (F), 1977, chp. V.E (b), para. 109, ILC Ybk, 1977, VII (F).

13 Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd ed., Manchester: Manchester University Press, 1999), at 456.

acquisition and occupation, while the second is based on the existence of rights “*ipso facto* and *ab initio*”.¹⁴

There is a clear parallel with the acquisition of title over land, requiring the exercise of authority à *titre de souverain* reinforced by the absence of protest by other States. Such “historic titles must enjoy respect and be preserved as they have always been by long usage”, and a State may base distinct legal claims on that concept.¹⁵ In *Land, Island and Maritime Frontier Dispute* handed down after the entry into force of the Convention,¹⁶ the Court endorsed *Continental Shelf* emphasizing that the statement from *Anglo Norwegian Fisheries* needed to be read in the light of the subsequent *Continental Shelf*.¹⁷ That case discusses the regime that such waters may have under customary law. The Chamber found the Gulf of Fonseca to constitute a historic pluri-state bay with a *sui generis* regime.¹⁸ This particular historical regime established by practice was especially important given the lack of any agreed and codified general rules even for single-State bays.¹⁹ The Chamber did not have to pronounce on the conditions for the coming into existence of such historic bays as the parties were agreed that the Gulf of Fonseca was a historic bay. But it can be surmised that the existence of a historic bay and its legal regime are subject to the usual conditions of customary law formation, including relevant concrete historical events such as international court judgments. This rationale can be transferred to the concept of historic title over waters.²⁰ Such title forms in customary law and its concrete legal regime can be either *sui generis*, or it can be associated with any general and codified rules of the law of the sea, for instance on internal waters, territorial waters, or the exclusive economic zone.

The second question concerns the reference the Convention makes to this customary law concept of historic title. The last preambular paragraph of the Convention affirms “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law” and

14 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18, 74, para. 100.

15 *Ibid.*, paras. 99 and 100 in fine.

16 Donald Rothwells and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010), at 48–9, with footnote 110.

17 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, 588, para. 384 [hereinafter *Land, Island and Maritime Frontier Dispute*].

18 *Ibid.*, paras. 384 and 412.

19 *Ibid.*, para. 384.

20 On the relationship between both concepts, *ibid.*, para. 383; Rothwell and Stephens, *International Law of Sea*, at 48.

that makes clear that custom will continue to have a role in the law of the sea even after the Convention's entry into force. It thus has to be established whether the Convention incorporates this custom, or rather leaves the issue to be regulated by customary international law outside the conventional regime. The Convention refers to historic title and similar notions of historic status in various contexts—bays (Art. 10(6)), maritime boundary delimitation (Art. 15), and archipelagic waters (Art. 46(b)). The Convention thus recognizes that the concept of historic status can be compatible with the very Convention establishing a legal order for the oceans.²¹ It then takes a position that incorporates some such historic status, while leaving others to the customary law. Thus, historic archipelagos are incorporated into the conventional regime, while historic bays are excepted from the conventional regime for juridical bays.²² For historic title over marine resources, the Convention's position is that it incorporates those. Art. 15 states explicitly that historic title can be a relevant circumstance leading to deviating from the equidistance method in delimitation disputes. But this would now also apply to the exclusive economic zone and the continental shelf, given the extension of the equidistance/relevant circumstances method to these maritime zones in the recent jurisprudence. Even the lesser historic use of marine resources becomes a factor of an equitable delimitation result. Where, for instance, access to historic fisheries is cut off with catastrophic effect, that requires the equidistance line to be adjusted.²³ By contrast, the Convention text is silent on historic title to waters located outside any of the conventional maritime zones of a coastal state. The incorporating reference is, however, implied. Extra-zonal, where a State's claim is not based on any zonal entitlement, the customary historic title has a function of apportionment. The coastal State receives qua customary law exclusive rights over water and its resources that would otherwise be high seas or fall under the zonal entitlement of another State.

2.3 *Judicial and Political Decision-making in Delimitation Disputes*

Arts. 74(1) and 83(1) only enunciate the broad objective that an equitable outcome is to be reached in every delimitation case. Both the zonal and the non-zonal approaches described above can assist in this task, but they are located at considerable level of abstraction and thus are not capable of being directly applied in contested cases. Only Art. 15 also indicates a means to achieve this

21 *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, para. 113.

22 *Land, Island and Maritime Frontier Dispute*, [1992] ICJ Rep 351, 588, para. 382.

23 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] ICJ Rep 61, 125, para. 196 [hereinafter *Black Sea*].

outcome, providing that the median line (equidistance) method should be used unless there are special circumstances such as historic rights.

However, the Convention compensates for the normative indeterminacy of this objective of equitable delimitation and the dearth of standards, by institutionalizing machinery for reaching an equitable result.²⁴ It provides for both judicial decision-making and for political decision-making embodied in the legally binding agreement of States.

2.4 *Developing Equitable Principles Judicially*

The Convention provides for comprehensive judicial decision-making on delimiting maritime boundaries contested between States Parties. Art. 74(2) and 83(2) refer delimitation disputes to the procedures under Part xv entailing a binding decision. This is adjudication by ITLOS or the ICJ or arbitration as the default procedure (Art. 287(3)).

The court or tribunal having jurisdiction under Part xv will then not just decide the delimitation case at hand. It will also, in each case, contribute to the development of the equitable principles transferable to other cases. The socially just distribution of global goods, such as marine resources, is a matter of broad norms accepted internationally.²⁵ Relevant equitable principles have, however, been fleshed out in a rich body of judgments and arbitral awards rendered in marine boundary delimitation disputes. These judgments and awards coalesce around a clear preference for the equidistance/relevant circumstances method, applying it to the territorial sea, the exclusive economic zone, and the continental shelf. As restated in the most recent *Bay of Bengal Award*, this method has three stages. The first stage involves the identification of a provisional equidistance line “using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place”.²⁶ The second stage considers relevant circumstances that may call for the adjustment of the provisional equidistance line in order to achieve an equitable result.²⁷ The jurisprudence gives some guidance on the relevant considerations.²⁸ The decision whether to adjust a provisional equidistance line, as well as the decisions on how much and in which direction the line should

24 Further John Linarelli (ed.), *Research Handbook On Global Justice and International Economic Law* (Edgar Elgar, 2013).

25 Albin, *Justice and Fairness*, at 34.

26 *Bay of Bengal Award*, para. 341.

27 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, [2002] ICJ Rep 303, 441, para. 288.

28 Particularly *Black Sea*, [2009] ICJ Rep 61.

be adjusted, then requires an assessment of the facts and the probable impact of the provisional equidistance line, which is largely a matter of appreciation. The third stage consists of an *ex post* check of non-disproportionality of the result reached at the second stage for each maritime zone.

The equidistance/relevant circumstances method is the default method for judicial maritime boundary delimitation. This is also true for the International Court of Justice,²⁹ even though that court has stated that the three stage process is not to be applied in a mechanical fashion and that it will not be appropriate in every case to begin with a provisional equidistance/median line.³⁰ The main alternative is the angle-bisector method. It applies where there are “factors which make the application of the equidistance method inappropriate”,³¹ generalizing irregular coastal features through a linear approximation of the relevant coasts. It starts with rendering the Parties’ relevant coasts as straight lines depicting their general direction. The angle formed by the intersection of these straight lines is then bisected to yield the direction of the delimitation line. The functions of the Commission on the Limits of the Continental Shelf do not bar a court or tribunal from delimiting the outer continental shelves of two adjacent States along these lines pending the issuance of recommendations, although not of two coastal States with opposite coasts.³² This equidistance/relevant circumstances method is based upon geometric techniques, as is the alternative angle—bisector method.³³ These geometric techniques express the foundational zonal principle for delimiting maritime zones between states. They are technical means for realizing the equitable principle that the maritime entitlement of a state should be proportionate the relevant coast, and thus its land.

2.5 *The Margin of Appreciation of States*

The elaborate provision of the Convention for judicial settlement of delimitation disputes must not obscure the Convention’s preference for a negotiated, political settlement of such disputes by the States concerned. Arts. 15, 74, and 83 make clear that coastal States locked in dispute are primarily to delimit

29 Ibid., para. 116. The ICJ may have jurisdiction over a case of marine delimitation under Part XV, or on grounds of a special agreement, or its compulsory jurisdiction under Art. 36(2) of the ICJ Statute.

30 *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, para. 194.

31 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, [2007] ICJ Rep 659, 741, para. 272 [hereinafter *Caribbean Sea*].

32 *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, paras. 113–131.

33 *Bay of Bengal Award*, para. 343.

their maritime zones by agreement—territorial sea, exclusive economic zone, and continental shelf. The agreement reached either explicitly or tacitly will then be determinative. Such treaty becomes the legal form for the political agreement that the States concerned are to reach by way of negotiation. In this regard, the Convention imposes on the coastal States concerned both an obligation of conduct and result. The conduct of each State must be such that the negotiations are meaningful. And the result must be equitable. The Convention also provides procedures to aid States in reaching an agreement, in particular conciliation. In addition, they are supported by the administrative mechanism embodied in the Outer Continental Shelf Commission, which issues recommendation to each State for delineating its single continental shelf beyond 200 nm.³⁴ The role of these recommendations where the outer continental shelves of two States with opposite or adjacent coasts overlap is not specified. Arguably, States should base their delimitation agreement on any recommendation, while they may still deviate from them for good reasons. They may also reach that agreement pending one or both recommendations.

The judicial and the political mechanisms outlined are to a considerable degree alternatives, rather than fully interchangeable, because of the functions and capacities each has and their impact on outcomes. A key issue then is the relationship between them. The substantive Convention provisions prioritize political decision-making as primary and judicial decision-making as secondary, because the latter becomes available only where the efforts at a negotiated settlement of the maritime boundaries of two or more States have been exhausted.³⁵ The procedural law of the Convention reinforces this. Section 3 of Part xv counter-balances the principle of compulsory third party dispute settlement of a delimitation dispute with optional exceptions.³⁶ Art. 298(1)(a)(i) allows each State to make a constitutive declaration excepting

34 David A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 Am J Int'l L. (2003), at 94–96. According to Art. 76(8), a coastal State shall submit information on the limits of its continental shelf beyond 200 nm to the CLCS. Its recommendation is a necessary condition for the exercise that each State holds under the Convention to delineate its outer continental shelf. The CLCS consists of twenty-one members who are experts in the field of geology, geophysics or hydrography and is to base its recommendations on geological, not geographical factors.

35 Cf. the second paragraphs of Arts. 74 and 83.

36 Art. 283 provides that only in the instance a negotiated settlement cannot be reached can either party submit the dispute to any of the procedures entailing binding decisions. The International Tribunal for the Law of the Sea (ITLOS) has understood this condition of the exercise of jurisdiction leniently, stating that it is for each State to determine when negotiations have been exhausted. *Southern Bluefin Tuna Cases (New Zealand v. Japan;*

disputes involving delimitation and historic title, with reciprocal effect.³⁷ Art. 298 provides for optional exceptions in disputes concerning the *existence* of States' rights, not the *exercise* of otherwise uncontested rights.³⁸ States can except these disputes concerning their vital interests from compulsory dispute settlement, and reserve them to their ex post consent. Consent remains the cornerstone of judicial settlement of delimitation disputes, lest the entire system of compulsory dispute settlement might become unacceptable.³⁹ There is no inherent overarching principle of the international rule of law that would shift this balance. It is of course true that the international rule of law is generally well served by the availability of compulsory judicial dispute settlement. Yet, this requirement is teleological in nature.⁴⁰ States Parties to UNCLOS have realized this requirement through Part xv balancing compulsory dispute settlement with optional and general exceptions.⁴¹ The Convention, then, does not provide one single precept on the use of either of the two mechanisms it institutes for equitable delimitation outcomes. This rather is a matter of choice for each State, through the vehicle of (withheld) consent under Art. 298(1)(a)(i). It accepts the political and the judicial mechanisms of reaching equitable delimitation results as equivalent. As a consequence of the concrete choices of States, judicial decision-making will prevail in some parts of the world's oceans, while in others it is the political decision-making. The Convention not prescribing a uniform mechanism entails that it contemplates non-uniform outcomes. This availability of choice will also entail asymmetries between the equitable principles underpinning political and judicial delimitation.

Australia v. Japan), Provisional Measures, ITLOS Cases No. 3 & 4, Order of 27 August 1999, paras. 60–61.

37 28 parties have made such declarations whose scopes vary considerably. For an up-to-date list of declarations, see http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (last visited 29 April 2015).

38 Arts. 298(1)(a)(ii) and (iii) relate to the margins of the law of the sea, military activities and the primary responsibility of the UN Security Council for international security and peace.

39 Churchill and Lowe, *Law of Sea*, at 455.

40 Arthur Watts, *The International Rule of Law*, 36 German Yb Int'l L. (1993), at 15.

41 The general exceptions that apply automatically are concerned with disputes relating to the exercise by coastal States of rights otherwise recognized to exist, in particular in regard to fisheries (Art. 297(3)(a)). Rothwells and Stephens, *International Law of Sea*, at 459, note that across the exceptions Part xv reserves consensual jurisdiction for two major areas of controversy in the law of the sea, maritime boundaries and exclusive economic zone fisheries.

However, the said, judicially developed equitable principles will apply to all future delimitation disputes, and not just those submitted to third party settlement. The Convention imbues those principles, couched in abstract and general terms, with binding effect for courts when deciding cases and for States when settling their maritime boundaries by way of an agreement. The Convention's underpinning the broad objective of equitable delimitation with judicial machinery empowers that machinery to generate equitable principles at a lesser degree of abstraction susceptible of being applied in disputed cases.⁴² All pertinent rulings of courts and arbitral tribunals, including those rendered under special agreements, where they converge on such a principle then indeed form an *acquis judiciaire*.⁴³ This *acquis* is a source of international law under Art. 39(1)(d) ICJ Statute.⁴⁴ It shapes the international law on which any delimitation must be based (Arts. 15, 74(1); 83(1)). Still, the reach of these judicially authorized principles has certain limitations, so that the States remain called upon to provide equitable principles through their practice. Three such limitations need be considered further.

Firstly, there are the uncertainties in the jurisprudence that result from the fact that a generalizable principle on an important delimitation but has not been developed yet. This is true in particular for the role of insular lands. When ITLOS was faced with the problem of islands in the delimitation process in its *Bay of Bengal* case,⁴⁵ it simply stated that the effect to be given "depends on the geographic realities and the circumstances of the specific case" and that there was no general rule in this respect. Each case was unique and called for specific treatment, the ultimate goal being to reach a solution which was equitable.⁴⁶ Thus, ITLOS did not provide a principle or generalizable rule.⁴⁷ As a result, the

42 Declaration of Judge Wolfrum in ITLOS *Bay of Bengal*, at 2.

43 The question whether ITLOS's jurisdiction in *Bay of Bengal* was compulsory or based on special agreement is discussed in the Individual Opinion of Judge Treves. Further Robert Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries* (Martinus Nijhoff, 2003).

44 *Bay of Bengal Award*, para. 339, reads: "The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention".

45 *Caribbean Sea*, [2007] ICJ Rep 659, para. 320; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, [1984] ICJ Rep 246, 336, para. 222 [hereinafter *Gulf of Maine*].

46 *Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Case No. 16, para. 317 [hereinafter ITLOS *Bay of Bengal*].

47 Declaration of Judge Wolfrum in ITLOS *Bay of Bengal*, at 3.

international jurisprudence on the role of islands in the delimitation process continues to lack the necessary coherence.⁴⁸

Secondly, the judicially developed principles so far involve a considerable margin of appreciation on the facts. This is also true for the equidistance line.⁴⁹ States also retain a margin of appreciation as to the law, since they may determine their zonal entitlements under the Convention by way of an agreed method that deviates from the median line.⁵⁰ In addition, the ICJ in *North Sea Continental Shelf* emphasized that “there is no legal limit to the considerations that states may take into consideration for the purposes of making sure that they arrive at equitable principles”.⁵¹ This remains the case under the Convention.⁵² States settling their maritime boundary by agreement have a range of options to accommodate their individual and joint interests in the maritime area under consideration.⁵³ The 2010 Barents Sea Treaty between Norway and the Russian Federation illustrates that. Concluding almost 40 years of negotiations,⁵⁴ that Treaty defines the single maritime boundary that divides the Parties’ continental shelves and exclusive economic zones in the Barents Sea and the Arctic Ocean as a compromise between the strict equidistance line proffered by Norway and the bisector line proffered by Russia. It also obligates them to continue their cooperation on fisheries and to coordinated exploitation of trans-boundary hydrocarbon resources.

Thirdly, the capacity of courts and tribunals to develop equitable delimitation principles remains inherently circumscribed. The court or tribunal only has jurisdiction to delimit those sea areas marked by overlapping claims by the

48 Ibid., at 5.

49 Ibid. (asking why this and not another equidistance line).

50 *Bay of Bengal Award*, para. 339: “Since Articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement of disputes”. (Emphasis added).

51 *North Sea Continental Shelf*, [1969] ICJ Rep 3, para. 85.

52 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005), at 247; Bernard Oxman, *Political, Strategic and Historical considerations*, 26 University of Miami Inter-American Law Review (1994), at 256.

53 Rothwells and Stephens, *International Law of Sea*, at 409.

54 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (done 15 September 2010, entered into force 7 July 2011), available at http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf (last visited 29 April 2015); see Tore Henriksen and Geir Ulfstein, *Maritime Delimitation in the Arctic: The Barents Sea Treaty*, 42 Ocean Development & International Law (2011), at 1.

disputing; seas to which only one State can or does lay a claim cannot be subject to judicially defined delimitation principles. Nor may the court or tribunal develop any re-distributional principles.⁵⁵ Redistribution remains the exclusive domain of the agreement of states. Within its competence, the adversarial procedure of the court or tribunal will be a limitation, as the judgment or award will depend on what the parties have argued or are agreed upon. For instance, in both *Bay of Bengal* cases the ITLOS and the Tribunal highlighted that the parties had not argued the presence of any historic titles and therefore did not consider those.⁵⁶ Finally, the very methodology and legitimacy of judicial decision-making creates a preference for legal certainty, and their transparent application. The actual maritime boundary delimitation by courts and tribunal on the basis of general rules that lend themselves to being judicially operated reflects that.⁵⁷

3 The Case of the South China Sea

The above developed framework for reaching equitable delimitation results under the Convention is coming to be tested in the case of the South China Sea (SCS). That sea is a marginal ocean basin of the Pacific Ocean totaling 3.5 million square kilometers and an average depth of over 2000 meters.⁵⁸ It contains four archipelagos: the Dongsha/Pratas Islands in the north, Zhongsha Islands/Macclesfield Bank and Huangyan Dao/Scarborough Shoal in the east, the Xisha Islands/Paracels to the west, and the Nansha Islands/Spratlys to the south. The SCS is the second most used global sea-lane, connecting the Pacific and Indian Oceans. Its natural living and non-living resources are of regional and worldwide significance.⁵⁹ All riparian States are parties to the Convention and claim the 200 nm exclusive economic zone and continental shelf from their mainland coasts, leaving an area of high seas in the centre of the SCS. Six riparian States presently assert sovereignty claims to the SCS islands

55 *Bay of Bengal Award*, para. 397.

56 ITLOS *Bay of Bengal*, para. 130; *Bay of Bengal Award*, para. 227.

57 *Bay of Bengal Award*, para. 344.

58 International Hydrographic Organization, *Limits of Oceans and Seas* (3rd ed, 1953) § 49.

59 The region has proven oil reserves of around 1.2 km³ (7.7 billion barrels), with an estimate of at least 4.5 km³ (28 billion barrels) in total. Natural gas reserves are estimated to total around 7,500 km³.

and/or waters.⁶⁰ China controls the Xisha Islands/Paracels and seven features of the Nansha Islands/Spratlys, while Vietnam controls twenty-one features of the latter. The Philippines maintains claims to a portion of the Nansha Islands/Spratlys and controls eight of them, referring to them as the Kalayaan Island Group. China and Taiwan both claim sovereignty over the four groups of insular features and surrounding waters and seabed, an area enclosed by the so-called Nine-Dash-Line.⁶¹

4 The Non-availability of Judicial Decision-making in the SCS

On 22 January 2013, the Philippines instituted arbitral proceedings against China under Part XV and Annex VII.⁶² Its application comprises two central submissions: that (i) China's Nine-Dash-Line is unlawful under the Convention, and that (ii) the status of the disputed insular features under Art. 121 be determined.⁶³

In its first submission, The Philippines allege that the Nine-Dash-Line is unlawful under the Convention. This application constitutes a dispute concerning the interpretation and application of the Convention.⁶⁴ The differing

60 For an overview, see Choon-ho Park, *The South China Sea Disputes: Who Owns the Islands and the Natural Resources?* Ocean Development & Int'l L. (1978), at 30, Marwyn S. Samuels, *Contest for the South China Sea* (Methuen 1982); Christopher C. Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-Politics in the South China Sea*, 13 Int'l J of Marine & Coastal L. (1998), at 195. France and Japan have renounced any claims.

61 For references and discussion of the Nine-Dash-Line see footnotes 76–81 *infra* and accompanying text.

62 *The Republic of the Philippines v. The People's Republic of China* (http://www.pca-cpa.org/showpage.asp?pag_id=1529 (last visited 29 April 2015)). The members of the Arbitral Tribunal are Judge Thomas A. Mensah (President), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, and Judge Rüdiger Wolfrum. The dispute has generated diverging scholarly positions, compare the contributions in S. Jayakumar, Tommy Koh and Robert Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Edward Elgar Publishing 2014) with those in Stefan Talmon and Bing Bing Jia (eds.), *The South China Sea Arbitration: A Chinese Perspective* (Hart/Bloomsbury 2014).

63 Republic of the Philippines, Notification and Statement of Claim on West Philippine Sea, 22 January 2013, available at <http://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos> (last visited 29 April 2015).

64 The Tribunal has to characterize the legal dispute on objective grounds giving particular attention to the formulation of the dispute chosen by the Applicant. The dispute itself then has to be distinguished from the arguments advanced by either party in support

views on the legality of the Nine-Dash-Line under the Convention constitute the dispute. This is to be distinguished from whether the jurisdiction of the Tribunal over this dispute is existent or excepted, by virtue of Art. 298.⁶⁵ The Arbitral Tribunal has to find jurisdiction of its own motion, regardless of China's rejection of arbitration.⁶⁶ Art. 5 of Annex VII confirms that it is for the Tribunal to determine whether or not it has jurisdiction in the case. Its *Kompetenz-Kompetenz* is not affected by one party's non-appearance,⁶⁷ even though that of course does not remove the problem that the non-appearance of one party deprives the Tribunal of critical factual information and legal argument.⁶⁸ The jurisdiction of the Tribunal in this case turns on whether it is excepted by virtue of the Declaration lodged by China under Art. 289. The Declaration of China summarily refers to Art. 298(1) and is thus coextensive with the scope of the optional exception clause.⁶⁹

This makes it necessary first to determine the scope of the conventional optional dispute clause. Of relevance here is subparagraph a) (i) of that provision (4.1). There then follows the second step of determining whether the present disputes fall thereunder.⁷⁰ These disputes concern the substance of the

of their claims. ICJ, *Fisheries Jurisdiction (Spain v. Canada)*, [1998] ICJ Reports 432, paras. 30–32.

65 The Arbitral Tribunal in *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of 15 March 2015, para. 211, focuses on the true or objective nature of the dispute, rather than referring to the application. This confuses the separate tasks of determining the dispute and jurisdiction over this dispute.

66 Note Verbale, 1 August 2013. In December 2014, China published a "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" in which it set out China's view that the Arbitral Tribunal lacks jurisdiction to consider the Philippines' submissions. The Tribunal will treat China's communications including the Position Paper as constituting a plea concerning the Arbitral Tribunal's jurisdiction for purposes of Art. 20 of its Rules of Procedure (Fourth Procedural Order, 22 April 2015).

67 *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, ITLOS Case No. 22, Order of 22 November 2013 [hereinafter *Arctic Sunrise*].

68 Cf. Joint individual opinion of Judges Wolfrum and Kelly in *Arctic Sunrise*, para. 6.

69 The Chinese Declaration (2006) reads: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part xv of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a)(b) and (c) of Article 298 of the Convention". Available at: United Nations, Division for Ocean Affairs and Law of the Sea, Declarations and Statements, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited 29 April 2015).

70 *Arctic Sunrise* confirms this two-step analysis (paras. 41 and 45 in regard to the Declaration of the Russian Federation under Art. 298).

Nine-Dash-Line (4.2), its form (4.3) on the one hand, and the legal status of the insular features of the SCS (4.4), on the other.

4.1 *Scope of the Optional Exception Clause of the Convention* (Art. 298(1)(a)(i) UNCLOS)

Art. 298(1)(a)(i) has two variants that except two different though closely related types of disputes. The first variant excepts “disputes concerning interpretation or application of Arts. 15, 74, and 83 relating to sea boundary delimitations”. For a dispute to be a delimitation dispute, at its heart there must be overlapping claims by States to parts of the sea based on the concepts of the territorial sea, exclusive economic zone, or the continental shelf. The rationale of this exception is that such disputes concern the existence of the sovereign rights of the coastal State and that the standards on sea boundary delimitation have not been clarified sufficiently.⁷¹ This rationale has not been superseded, since the law on maritime boundary delimitation is still evolving.⁷² Art. 298(1)(a)(i) in its second variant excepts disputes “involving historic titles”. Within Art. 298(1)(a)(i), historic titles form a category of dispute that is separate from maritime delimitation disputes. This is clear from the fact that the Convention already treats historic title as part of the zonal maritime delimitation. Disputes involving historic title include both their interpretation and application, so that disputes regarding the rules on historic titles as well as their concrete existence are excepted. The wording of the provision indicates that ‘historic title’ is separate from other conventional concepts. Importantly, then, the term does not refer exclusively to historic title where recognised by the Convention.⁷³ Disputes involving other historic titles are covered as well. This also corresponds to the object and purpose of the provision. Since consensus on a conventional definition of historic title proved elusive at the Third UN Conference on the Law of the Sea,⁷⁴ the solution that the Convention prefers in this situation is to proceduralise this substantive law question. A court or tribunal is competent to consider customary title incidentally (Art. 293(1)).⁷⁵

Art. 298(1)(a)(i) is situated within the context of the dispute settlement provisions of the law of the sea. This exception to jurisdiction therefore has a plausibility requirement. Just as a claimant State needs to make its claim

⁷¹ Churchill and Lowe, *Law of Sea*, at 456.

⁷² *Bay of Bengal Award*, paras. 97–100.

⁷³ Cf. the wording of Art. 15 (“historic title or other special circumstances”).

⁷⁴ Churchill and Lowe, *Law of Sea*, at 456.

⁷⁵ *The “ARA Libertad” Case (Argentina v. Ghana)*, Provisional Measures, ITLOS Case No. 20, Order of 15 December 2012, para. 98.

plausible on law and on fact under the Convention to be able to invoke the jurisdiction of a court or tribunal, the reverse holds true. In particular, claims to historic title by one party must be substantiated and must comprise a substantial part of the overall dispute to ground an exception the jurisdiction of the court or tribunal that would otherwise exist.

Jurisdiction of the Tribunal over the dispute as to the lawfulness of the Nine-Dash-Line is thus excepted if it has to be determined by reference to Arts. 15, 74, and 83 relating to sea boundary delimitations or the rules on historic title. Answering this question requires an assessment of the objective substance of the Nine-Dash-Line.

4.2 *The Substance of the Nine-Dash-Line Falls under Art. 298*

The substance of the Nine-Dash-Line is matter of its content, status and function, seen in the context of China's actions in regard to the scs.

As to its content, China's U-Shaped Line is composed of nine dashes and extends to the southern part of the scs, adjacent to the shores of Vietnam, Indonesia, Malaysia, Brunei, and the Philippines.⁷⁶ The original version of the Line appeared in a Chinese map in 1914, drawn by Chinese cartographer Hu Jin Jie. The Line was first published as a map by the then Chinese Nationalist Government in February 1948, composed of eleven dashes and entitled The Location Map of the South China Sea Islands. After the founding of the People's Republic of China two dashes were removed in 1953, excluding the Beibu Gulf/Gulf of Tonkin.⁷⁷ The Nine-Dash-Line is to be placed in the context of the acts in regard to the scs that China has taken under international and national law.

On ratification of the Convention in 1996, China made a Declaration providing that it shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nm and the continental shelf, that it will affect through consultations the delimitation of boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis

76 For the considerable literary discussion of the Nine-Dash-Line, see Zhiguo Gao and Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implication*, 107 AJIL (2013), at 98; Masahiro Miyoshi, *China's "U-Shaped Line" Claim in the South China Sea: Any Validity Under International Law?* 43 Ocean Development & Int'l L. (2012), at 1; Erik Francks and Marco Benatar, *Dots and Lines in the South China Sea: Insights from the Law of Map Evidence*, 2 Asian J of Int'l L. (2012), at 89; Thang Nguyen-Dang and Hong Thao Nguyen, *China's Nine-Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes*, 43 Ocean Development & Int'l L. (2011), at 35; Li Jinming and Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 Ocean Development & Int'l L. (2003), at 287.

77 Li and Li, *Dotted Line of scs*, 290.

of international law and in accordance with the equitable principle, and that it reaffirms its sovereignty over all its archipelagos and islands as listed in Art. 2 of the 1992 Law.⁷⁸ The Nine-Dash-Line was internationally used by China for the first time in 2009, being attached as a map to its response to the joint submission to the Commission on the Limits of the continental shelf made by Malaysia and Vietnam. The Chinese Note states that the Line includes “sovereignty over the islands in the South China Seas and the adjacent waters” and “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil”.⁷⁹ In response to a Philippines Note Verbale,⁸⁰ China restated in 2011 in another Note that it had sovereign rights over the islands, waters and the seabed of the SCS, on historic and legal grounds, and to the maritime zones generated by the Nansha Islands/Spratlys, a territorial sea, contiguous zone, exclusive economic zone, and continental shelf.⁸¹

The pertinent national legislation is in essence as follows. The Declaration on Territorial Sea of 4 September 1958 announced that a 12 nm territorial sea surrounds all Chinese territories, including the Chinese mainland, the specifically named SCS islands, and all those other islands claimed by China which are separated from the mainland and its coastal islands by high seas.⁸² In 1992, China promulgated its Law on the Territorial Sea and the Contiguous Zone.⁸³

78 China's Declaration of UNCLOS upon Ratification on 7 June 1996 is *available at* http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China (last visited 29 April 2015). For the 1992 Law referred to in the declaration see footnote 85 *infra*.

79 CML/17/2009, 7 May 2009, para. 2. It reads: “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international Community”. See also the Letter CML/18/2009 for the identically worded objection to Vietnam's individual submission. These documents are available at the website of the CLCS.

80 Note Verbale 000228, 5 April 2011.

81 CML/8/2011, 14 April 2011, para. 1: “China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence” (Emphasis added).

82 In response, North Vietnam's then prime minister, Phạm Văn Đồng, sent a diplomatic note to his counterpart Zhou Enlai, stating that “The Government of the Democratic Republic of Vietnam respects this decision”, *available at* <http://www.spratlys.org/collection/claims/vietnam/vietnam1.htm> (last visited 29 April 2015).

83 “China's Law on the Territorial Sea and the Contiguous Zone,” *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf (last visited 29 April 2015) [hereinafter referred to as 1992 Law].

Art. 2 of that Law includes within its land territory the four island groups in the scs as well as other islands comprised within China's twelve-mile territorial sea. Art. 3 authorizes the use of straight baselines for measuring the breadth of the territorial sea; the baselines for the Xisha Islands/Paracels consist of straight lines linking twenty-eight coordinates. In 1998, China established its exclusive economic zone and continental shelf "throughout the natural prolongation of its land territory", which comprises the said scs insular features according to the 1992 Law.⁸⁴ Art. 14 of the 1998 Act provides that "the provisions of [the] Act shall not affect the historical rights of the People's Republic of China".⁸⁵

The principal physical embodiment of the Nine-Dash-Line then is a map to which certain unilateral acts by China make reference. The general status of maps in international law is that they have evidential, not constitutive value for an international legal act, such as a treaty, a court decision, or a unilateral act.⁸⁶ A map may, however, serve as context for the interpretation of any such act. The international jurisprudence makes that plain. The ICJ, after discussing the evidential value of maps in *Frontier Dispute*, there stated that maps may acquire legal force "when [they] are annexed to an official text of which they form an integral part".⁸⁷ Similarly, the Arbitral Tribunal in *Bay of Bengal* considered that it should not attempt to establish the land boundary terminus "on the basis of the wording of the Radcliffe Award without giving due regard to the attached map".⁸⁸

Whatever the understanding of the Nine-Dash-Line was before the time that China became bound by the Convention, it has referred to it in making claims after becoming party to the Convention. These claims are unilateral acts.⁸⁹ Unilateral acts need to be interpreted with particular weight accorded to the discernible intention of the acting State.⁹⁰ The relevant Chinese prac-

84 "Exclusive Economic Zone and Continental Shelf Act of 26 June 1998," available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1998_eez_act.pdf (last visited 29 April 2015) [hereinafter referred to as 1998 Act].

85 Emphasis added. See also Ministry of Foreign Affairs of the PRC, "Historical Evidence to Support China's Sovereignty Over the Nansha Islands," available at <http://www.coi.gov.cn/scs/article/2.htm> (last visited 29 April 2015).

86 Francks and Benatar, *Insights from Law of Map Evidence*, at 89–118.

87 *Frontier Dispute (Burkina Faso/Republic of Mali)*, [1986] ICJ Rep 554, 582, para. 54.

88 *Bay of Bengal Award*, para. 184.

89 On the variety of unilateral acts, see Ian Brownlie, *Principles of Public International Law* 416 (James Crawford, 8th ed., OUP 2012).

90 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, [2006] ICJ Rep 28, paras. 49–50.

tice then comprises in particular the 1996 Declaration, the 2009 Note, and the 2011 Note, which express claims in the maritime zone categories of the Convention.⁹¹ The 2011 Note in particular reiterated the historic entitlement under customary law,⁹² in response to the express challenge contained in a preceding Philippines Note.⁹³ The Nine-Dash-Line as embodied in internationally used maps then aids in the interpretation of these claims in regard to the SCS. Through it, China intends to evidence the geographical extent of the different rights it claims under the Convention and customary international law.

The principal function of the Nine-Dash-Line then is a summary reference to the bundle of concrete zonal claims in regard to the waters and the seabed that fall under the categories of territorial sea, exclusive economic zone and continental shelf, as generated by the mainland of China and the claimed insular lands in the SCS. These claims are plausible. The concrete insular lands potentially generate relevant maritime zones, certainly the Nansha Island/Spratlys and also Huangyan Dao/Scarborough Shoal regardless of whether it is an island or a just a rock with a territorial sea. The general rules on the delimitation of the maritime zones of states with opposing coasts also apply to off-lying insular lands. It is true that the International Court of Justice has occasionally disregarded very small islands or not given them their full potential entitlement to maritime zones, where this would have a disproportionate effect.⁹⁴ In other instances, however, the Court has acknowledged that insular features create their own maritime zones and taken these into consideration in delimiting the zones of the other party with an opposite coast.⁹⁵ And so has ITLOS.⁹⁶ These plausible claims then define a zonal delimitation dispute falling under Art. 298(1)(a)(i) first variant. The Nine-Dash-Line is thus inextricably linked to these zonal claims of China.

91 CML/8/2011, para. 3: "In addition, under the relevant provisions of the 1982 UNCLOS... China's Nansha Island is fully entitled to Territorial Sea, Exclusive Economic Zone (exclusive economic zone) and continental shelf".

92 CML/8/2011, para. 1: "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence" (Emphasis added).

93 Philippines Note, 5 April 2011, under "On the Other 'Relevant Waters, Seabed and Subsoil' in the SCS".

94 *Black Sea*, [2009] ICJ Rep 61, para. 185 with references.

95 *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, para. 125.

96 ITLOS *Bay of Bengal*, para. 169 ("accorded off lying St. Martin's Island (Bangladesh) an own territorial sea of 12 nm on the ground that otherwise the sovereign rights of Myanmar in its exclusive economic zone and continental shelf would have greater weight than to the sovereignty of Bangladesh").

Residually, the Nine-Dash-Line refers to claims based on historic title over waters and the seabed of the SCS, which it also evidences. These claims have been made in other forms, in particular the 2011 Note. It is plausible that there can be historic title to SCS waters held by China within and beyond its claimed maritime zones, both on law and on fact. That is the case. As shown above, under the Convention historic title can play a role infra-zonal, as a relevant circumstance for the equitable delimitation of two opposite coasts. And historic title can play a role extra-zonal, as acquisition of waters falling under established concepts or as special regime under the customary law of the sea. The parties may disagree as to the role for historic title, in particular in regard to zones of overlap resulting from projections seaward from the mainland coast, and on as to whether such a customary regime has actually formed on the use of the fishery resources in the SCS. Yet both these disputes concerning the legal role and the concrete regime of such rights “involve” non-zonal historic title and are, for that reason, excepted from the jurisdiction of the tribunal by virtue of Art. 298(1)(a)(i) second variant.

Substantively, the Nine-Dash-Line is thus an integral part of the claims of China in regard to marine zones and/or historic title in the SCS, to be delimited from those of the Philippines. These claims fall under Arts. 15, 74, or 83 of the Convention. The dispute as to the substance of the Nine-Dash-Line is thus excepted by Art. 298(1)(a)(i) first and second variant.

4.3 *The Form of the Nine-Dash-Line*

However, the Philippines submission may be taken to address not the substance, but the form of the Nine-Dash-Line, that is the very means by which China expresses and evidences its claims. The critical question is whether the form in which a State expresses its claims to maritime zones and titles can affect a right that the applicant can plausibly point to as potentially violated. Yet, there is no separate right of a state that another make its maritime claim in a specific form. The Convention does not have a numerus clausus of forms of actions for States parties, which remain free to express their intention in a manner they choose. State practice under the Convention and in many judicial delimitation cases confirms that States state their claims in maximal forms. It may be desirable that States make their maritime claims in a manner that is as precise and as possible. But as long as the form chosen does not constitute a refusal to negotiate contrary to Arts. 15, 74(1), and 83(1), it remains ancillary to what is in essence a dispute over maritime delimitation, historic title, and sovereignty over insular land.

4.4 *The Legal Status of the Insular Features of the scs*

The Philippines second application regarding the status of the insular lands in the scs under the Convention also falls under 298(1)(a)(i). The status of these concrete insular lands cannot be determined in the abstract. Rather, qualifying these insular lands under Art. 121 would have a direct impact on the maritime delimitation dispute pending between the Philippines and China and which is excepted by Art. 298. The qualification of these insular lands, whether they are islands at all, and then whether they are rocks with just a territorial sea or full islands with an exclusive economic zone and a continental shelf, thus determines, as an automatic and direct consequence the existence and the extent of the maritime zones they entail.

In addition, Art. 298(a)(i) in fine makes clear that disputes that involve the concurrent consideration of sovereignty over insular land are excepted from compulsory dispute settlement. Yet, assessing the status of these insular lands necessarily involves the consideration of the sovereignty over these lands.⁹⁷ For an abstract question relating to the Convention will not ground the jurisdiction of the Tribunal.⁹⁸ A State may only request clarification of the status of such insular lands over which it is sovereign or claims sovereignty. Sovereignty over the Nansha Islands/Spratlys and Huangyan Dao/Scarborough Shoal being claimed by both parties to the dispute, the status of these insular lands under the Convention involves the concurrent consideration of disputed sovereignty over these lands, and it thus becomes a dispute excepted by Art. 298(1)(a)(i).

5 Principles for Political Decision-making on the Disputed Lands and Waters of the scs

It falls on the riparian States of the scs to achieve the equitable resolution of their overlapping claims by way of one or several negotiated agreements. Pending a final agreement, States are to “make every effort to enter into

97 This is a specific exception of sovereignty disputes within Art. 298. No position needs to be taken on whether sovereignty disputes generally fall outside Part xv. This is the position of the Arbitral Tribunal in the *Chagos Marine Protected Area* case. Generally, Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 Int'l J of Marine & Coastal L. (2012), at 59.

98 *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, paras. 93–155.

provisional arrangements of a practical nature” (Art. 74(3) and Art. 83(3)).⁹⁹ States may draw on the procedures that Section 1 of Part xv of the Convention devises.¹⁰⁰

Such maritime delimitation disputes that are excepted from a judicial or arbitral decision then become subject to mandatory conciliation. The parties will then be obligated to negotiate an agreement that implements the conciliation proposal (Art. 298(1)(a)(ii)). Where they do not reach agreement, any third party-settlement again presupposes their mutual consent. Although the wording of Art. 298(1)(a)(ii) is unclear in this respect, this interpretation reflects Art. 299 stating that any dispute excepted under Art. 298 may be submitted to third party-settlement only with the consent of both parties.

However, delimitation disputes requiring the concurrent determination of disputed sovereignty over insular land are not subject to this mandatory conciliation (Art. 298(1)(a)(i) in fine). The term “insular land” refers to Art. 121(1) adopting the general definition under international law of islands as any land above water at high time regardless to size. The sovereignty question arises “concurrently” in a dispute concerning the delimitation of maritime boundaries where the insular land is situated within 200 nm of the coast of either party.¹⁰¹ That is the case for the insular lands disputed between the Philippines and China located within 200 nm of the coast of the Philippines. It is unclear whether this removes from mandatory conciliation the dispute in its entirety or only to the extent that the concrete insular lands and maritime zones that they generate are concerned, in which case the boundary would remain subject to mandatory conciliation to the extent that the disputed land is not affected.¹⁰²

Given that the claims of the parties to the waters and the seabed of the SCS overlap, even though based on different entitlements, the overarching obliga-

99 See Natalie Klein, *Provisional Measures and Provisional Arrangements in Maritime Boundary Disputes*, 21 Int'l J of Marine & Coastal L. (2006), at 423; Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 Am J of Int'l L. 2 (1984), at 345; Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AJIL (2013), at 158.

100 But others can also be used. In *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, ITLOS Case No. 12, ITLOS suggested the parties use a panel of experts.

101 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] ICJ Rep 40, 101–102, para. 205 [hereinafter *Maritime Delimitation and Territorial Questions*]; *Caribbean Sea*, [2007] ICJ Rep 659, para. 302. See, however, the inconclusive reasoning in *Black Sea* [2009] ICJ Rep 61, 125, para. 179.

102 Oxman, *Political, Strategic and Historical Considerations*, at 269.

tion for the riparian States then is to achieve an equitable delimitation of the areas concerned, “on the basis of international law”. In what follows, the paper sets out two relevant equitable principles for discharging this obligation.

5.1 *The Land Dominates the Sea*

The *Bay of Bengal* Tribunal, in justifying its delimitation decision, has highlighted the notion that the land dominates the sea.¹⁰³ This equitable principle also covers insular land of the SCS. Art. 121 confirms that islands are capable of generating maritime zones of their own, then further differentiating islands in a narrower sense with their own territorial sea, exclusive economic zone and continental shelf, from rocks that only have a territorial sea.

Concretising this equitable principle in the case of the insular lands of the SCS then requires determining who has sovereignty over each of them. This is a matter of general international law, which holds that each insular land, however small, that remains above water at high tide is capable of appropriation by States.¹⁰⁴ Such appropriation requires effective exercise of State power. Several types of state power are apt to acquire title over such land.¹⁰⁵ Their actual exercise needs to be proportionate to the insular land in question. In remote regions it can be minimal. The absence of any objection by third States reinforces the title. The ICJ decision in *Sovereignty over Pedra Branca* is particularly illustrative, concerning disputed sovereignty over tiny uninhabited and uninhabitable islands in the Singapore Straits. There, the Court confirmed that original title over such land can be acquired by both territorial and personal historic exercise of authority, including over fishermen.¹⁰⁶ Such historic action need not reflect a modern concept of sovereignty.¹⁰⁷ Later factual (effective) exercise of power by another State does not transfer the original title thus acquired, in the absence of agreement or acquiescence.¹⁰⁸ In addition, the

¹⁰³ *Bay of Bengal Award*, para. 279.

¹⁰⁴ *Maritime Delimitation and Territorial Questions*, [2001] ICJ Rep 40, 102, para. 206. The Court found that Qit'at Jaradah, being 0.4 metres above water at high tide, was an island. On the probative issues of matter, see *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, para. 36.

¹⁰⁵ *Territorial and Maritime Dispute*, [2012] ICJ Rep 624, paras. 25–38; *Caribbean Sea*, [2007] ICJ Rep 659, paras. 168–208.

¹⁰⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, [2008] ICJ Rep 12, 37–39, paras. 70–75, 79 [hereinafter *Sovereignty over Pedra Branca*].

¹⁰⁷ *Ibid.*, para. 79.

¹⁰⁸ Dissenting Opinion of Judges Simma and Abraham in *Sovereignty over Pedra Branca*, para. 13; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* ([2002] ICJ Rep 625) concerned transfer of an original title to another sovereign by agreement.

general temporal cut off is the time that the sovereignty dispute has crystallized, so that acts by any of the disputants after that time are irrelevant.¹⁰⁹ Any detailed application of these principles to the SCS insular lands is obviously beyond the scope of the present paper and will require further study.¹¹⁰

The Convention concretizes the foundational equitable principle that the land dominates the sea by creating maritime zones of the coastal state based on a norm of geographical distance from the relevant coasts. As regards the capacity of the insular lands in the SCS to generate maritime zones, it needs to be noted that the terms “island” and “rock” that Art. 121 UNCLOS employs have never been defined in international adjudication. States retain a large margin of appreciation in each instance, in regard to the very consideration of specific insular features as well as whether they are generating an own territorial sea, exclusive economic zone and continental shelf remain a matter of appreciation. This is true for insular features near the mainland coast. State practice generally takes into account the effect of islands and even low-tide elevations in drawing agreed delimitation lines.¹¹¹ In *Black Sea*, the Court accepted for instance that the parties had accorded to Serpentine Island a 12 nm territorial sea by treaty, although they later disagreed on its status under Art. 121.¹¹² It is also true for insular features further off the mainland coast.¹¹³ The Barents Sea Agreement apparently accords the Svalbard archipelago the capacity to generate its own continental shelf, independent of that of the Norwegian mainland.¹¹⁴

The delimitation of the maritime zones of two States with adjacent or opposite coasts in the SCS can then follow the three-stage methodology described above. Still, the equidistance-cum-relevant circumstances method has so far

109 *Caribbean Sea*, [2007] ICJ Rep 659, para. 117.

110 For diverging views in the literature, see Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective*, 2 Chinese J of Int'l L. (2002), at 94; Monique Chemillier-Grendeau, *Sovereignty over the Paracels and Spratly Islands* (Martinus Nijhoff, 2000).

111 Agreement between the Government of the French Republic and the Government of the Kingdom of Belgium on the delimitation of the continental shelf (done 8 October 1990, entered into force 7 April 1993), available at <http://www.marineregions.org/documents/FRA-BEL1990CS.pdf> (last visited 29 April 2015).

112 *Black Sea*, [2009] ICJ Rep 61, para. 188.

113 Treaty between the Government of the United Mexican States and the Government of the United States of America on the delimitation of the continental shelf in the western Gulf of Mexico beyond 200 nautical miles (done 9 June 2000, entered into force 17 January 2001) 2143 UNTS 417.

114 Henriksen and Ulfstein, *Maritime Delimitation*, at 9.

been judicially applied only for purposes of delimiting two overlapping claims based on the same conceptual entitlement, that is territorial sea, exclusive economic zone, and continental shelf. It is not clear that and how it would apply to claims based at least partially on historic title, as it the case for the SCS. In such case, the use of the equidistance method may become inappropriate, in line with the caveat in *Caribbean Sea*. Or, States could consider historic title a relevant circumstance to modify the provisional equidistance line at the second stage. Courts and tribunals have accepted as such a relevant circumstance one State being cut-off by the provisional equidistance line from claiming an exclusive economic zone or a continental shelf.¹¹⁵ But the list of relevant circumstances is open to further additions.¹¹⁶

At any rate, equidistance/relevant circumstances remains one delimitation method and in this sense it is dispositive law. States remain free to base their delimitation agreement on other principles than the median line. In *Maritime Dispute*, the Court found and accepted a (tacit) agreement of the parties delimiting the territorial sea and parts of the exclusive economic zone in variance from the median line.¹¹⁷ Indeed, as the delimitation of maritime boundaries rests primarily on the agreement of the States, these are free in the criteria that they want to base their agreement on, including historic title. State practice has yielded some particularly innovative approaches, often as a result of particular geographic, historical, and other factors at play.¹¹⁸ In this practice, historic titles indeed often underlie express or tacit agreements.¹¹⁹

5.2 *Historic Title and Uses*

The second applicable equitable principle is historic title and historic use in the SCS, within and outside the Convention-defined maritime zones. Particularly for Asia, arbitral tribunals and courts have been ready to allocate title to land territory on the basis of historic and more recent *effectivités*,

¹¹⁵ Most recently, *Bay of Bengal Award*, paras. 110–114.

¹¹⁶ Malcolm Evans, *Relevant Circumstances and Maritime Delimitation* (OUP 1989).

¹¹⁷ *Maritime Dispute (Peru v Chile)*, Judgment of 27 January 2014 (nyr), para. 91.

¹¹⁸ Further Jonathan I. Charney et al. (eds.), *International Maritime Boundaries*, vol. 1–5 (Martinus Nijhoff, 1993–2005).

¹¹⁹ For instance the Treaty concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters between Australia and Papua New Guinea (done December 1978; entered into force in February 1985, 1429 UNTS 207, includes a protected zone in the middle of the boundary that accommodates the interests of indigenous peoples, including their traditional fishing practices.

including over water, where there is appropriate evidence.¹²⁰ States have considerable leeway in determining the exact legal regime for such title. The *Land, Island and Maritime Dispute* as well as the *Eritrea/Yemen Award* highlight that a regime of the joint use of waters disputed by the riparian States on historic grounds can be an equitable outcome. The Barents Sea Treaty accommodates a special regime for historic uses—fisheries—within an overall zonal approach to the disputed resources. Its preamble states that the parties are “aware of the traditional Norwegian and Russian fisheries in the Barents Sea”. In its operative part, Art. 4 prescribes that the fishing opportunities of either party shall not be adversely affected by the Treaty. The parties shall closely cooperate, with a view to maintain their existing respective shares of total allowable catch volumes and to ensure relative stability of their fishing activities for each of the stocks concerned. It bears noting that the Treaty embraces a more lenient standard for the consideration of existing fisheries for delimitation purposes, than the catastrophic effect on such fisheries that the jurisprudence has demanded in order to be considered a relevant circumstance capable of modifying the provisional equidistance line.¹²¹

5.3 *Equality of Outcome*

Finally, an overarching equitable principle for States reaching a settlement of sea boundaries in the SCS may simply be absolute equality of outcomes.¹²² Under it, the area of conflict demarcated by the overlapping claims would be divided on the basis equal shares for either party. This outcome-focus may be particularly appropriate where the claims are based on different delimitation methods within the zonal approach. The Barents Sea Treaty is an illustration. That Treaty is apparently based on an equitable sharing of the disputed sea area arising from the overlap of the sector lines claimed by Russia and the median lines claimed by Norway.¹²³ To ensure such parity of outcome, States then remain free to create and transfer functional rights over waters that

120 In particular *Arbitration Pursuant to an Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen, First Stage*, paras. 114–45 [hereinafter *Eritrea/Yemen Award*]; *Sovereignty over Pedra Branca*, [2008] ICJ Rep 12, 33, para. 52, goes back to the early 16th century to establish the Sultanate of Johor's presence and the absence of rival claims over the disputed islands. In cases such as *Minquiers and Ecrehos*, [1954] ICJ Rep 47, and *Western Sahara*, [1975] ICJ Rep 12, the Court has preferred to focus on the situation closer in time to the dispute.

121 *Gulf of Maine*, [1984] ICJ Rep 246, para. 237.

122 Albin, *Justice and Fairness*, at 35 (“split-the-difference”).

123 Henriksen and Ulfstein, *Maritime Limitation*, at 6 with footnote 58 (citing a statement made by the Russian Foreign Minister on signing the Treaty).

would fall within any of their maritime zones, regardless of whether these are covered by overlapping claims. Again, the Barents Sea Treaty provides illustration. Art. 3 of that Treaty signs over to Russia a sea area located within 200 nm of the Norwegian coast but beyond 200 nm from the Russian coast. The Treaty makes clear that this area does not become part of the Russian exclusive economic zone but rather receives a special legal status. Such parity of outcome-focus may also be appropriate where the claims to the disputed waters are based on the zonal approach by one party and the non-zonal approach of the other.

6 Conclusions

The 1982 UN Law of the Sea Convention aspires to the internationally just distribution of the marine resources situated between the land and the deep seabed and high seas. This aspiration underlies not just their apportionment, but also the delimitation of the overlapping claims between several coastal States. The paper has demonstrated the Convention to form institutionalized oceans governance for that purpose. Where the claims of several coastal States overlap, the Convention requires that the resulting delimitation produce an equitable outcome. The Convention then provides machinery to achieve this indeterminate objective, comprising a judicial and a political mechanism. The judicially developed equitable principle of equidistance/relevant circumstances method in particular would apply to future boundary agreements between States as well. Still, primarily States are to provide a political solution through agreement. States retain a considerable margin of appreciation for States in regard to what they will consider an equitable outcome under two broad approaches. The Convention proffers the distributional approach that the land dominates the sea, realizing through the concept of the maritime zones for coastal states that it sets forth. While this is strictly geographical, the Convention also countenances historic title grounded in customary law as a non-geographical basis for resources distribution. The scs then provides a litmus test for the Convention's capacity of achieving a just distribution of ocean resources in this complex scenario of overlapping claims by riparian States based on zonal and non-zonal entitlements. No comprehensive judicial decision-making is available there, given that China's declaration under Art. 298(1)(a)(i) excepts all disputes relating to the delimitation of maritime zones or to historic title in that sea. Such equitable delimitation and thus distribution of the resources of the scs must be achieved through one or several agreements concluded by the riparian States. Of particular relevance for the

scs then are three equitable principles: that the land dominates the sea, comprising the consideration of its insular lands under disputed sovereignty and appropriate zonal delimitation; the recognition of historic title and historic uses of the scs; and a focus on an outcome based on equal share of the disputed waters for States, including through creation and transfer of functional rights. State practice, such as the recent Barents Sea Treaty, indicates how these principles could be concretized.

The analytic implication of the article's finding that equitable maritime boundary delimitation is underpinned by the judicial and political institutionalization is that both mechanisms produce equitable principles capable of being applied in future cases. The challenge for analysts of the law of the sea then is to legally conceptualize the interaction of these principles. There are also implications for the relevant actors within this institutionalized oceans governance. For courts and tribunals, as judicial actors, the key implication is that the *acquis judiciaire* on equitable delimitation principles ought to be further clarified on key issues, such as islands and historic title. The implication for States, as the political actors, is that they must take judicially developed and developing equitable principles into consideration, as these shape the "international law" standard that States have to base their agreed marine resources allocation on. Still, States may and indeed must make use of their considerable margin of appreciation in reaching an overall equitable result, and, in so doing, take guidance from relevant state practice.